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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTWAN DEQUAN IRBY, Defendant and Appellant.	B270752 (Los Angeles County Super. Ct. No. SA090437)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden Fox, Judge. Affirmed in part, reversed in part.

Katja Grosch, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Lance E. Winters, Assistant Attorney General; Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Antwan Irby appeals from the judgment entered after his jury conviction of 14 counts of vandalism. Appellant's appointed counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436, and appellant filed no response to our letter. After examining the record, we invited the parties to brief the issue whether count 8 is supported by evidence, and they agreed it is not. We reverse appellant's conviction on that count and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL SUMMARY

At about 8:00 a.m. on May 16, 2015, Kenneth Howell was riding a bicycle near the corner of 6th Avenue and Broadway Court in the Venice neighborhood of Los Angeles. He saw an individual walking alongside cars parked on 6th Avenue between Broadway Court and Westminster Avenue. Howell saw the individual make sweeping motions on the driver's side of a Mercedez-Benz and a BMW. The individual looked up at Howell when he was by the BMW. Howell noticed that the cars had been scratched in the areas where he had seen the individual come in contact with them. A swastika had been carved into the driver's door of the Mercedes, and there was a long scratch along the driver's side of the BMW.

The individual headed east on Westminster Avenue. As Howell passed him, they exchanged looks, and when Howell turned around to observe him, he saw a shiny object in the individual's right hand. After briefly going home, Howell returned to the area and reported what he had seen to police officers who had responded to a call reporting vandalism at about 9:10 a.m.

Howell described the suspect as a heavy-built black male, about six feet tall, wearing a green hooded sweatshirt and denim jeans, with bushy hair and a beard. A broadcast of the suspect's description was issued at 9:25 a.m. Howell was transported to the nearby Oakwood Park to view an individual detained there, but Howell did not think that individual resembled the suspect.

Meanwhile, Officer Fletes had taken a victim report from David Furey, the owner of the Mercedes and BMW, who did not testify at trial. Other victims had begun approaching him as well with reports of damage to their cars. Marco Cifuentes's BMW, parked across 6th Avenue from Furey's cars, had been defaced with a swastika and an Illuminati sign (a triangle with a circle or an eye in the middle), which cost $500 to repair.

Seven cars parked along Westminster Avenue had been similarly damaged. Oscar Munoz's Lexus showed a swastika and an Illuminati sign. A rental Ford Fusion belonging to Avis Budget Group (Avis) showed a swastika, an Illuminati sign, and the word "Killumati," all of which cost $518.60 to repair. An Infinity belonging to Andrew Kolvet showed a swastika and an Illuminati sign, and his wife's Lexus had the word "Killumati" and an Illuminati sign. The damage to each of the Kolvets' cars cost approximately $1,000 to repair. There were three long roughly parallel scratches over the front right tire of Erica Saxon's Scion. Jhoel Gutierrez's Audi had the word "Killumati" and an Illuminati symbol. A scratch along the entire side of Tobi Acklen's Jeep Cherokee cost $1,700 to repair.

Officer Fletes also spoke to Taylor Kannett, who drove to Westminster Avenue from a nearby street, Electric Avenue, to report a scratch to her Audi. At trial, the court sustained the defense's objection, struck the officer's testimony regarding the

reported location where the car had been parked, and instructed the jury not to consider the officer's testimony regarding Kannett's vandalism report for its truth.

Later that same morning, Roy Barton, who lived near the corner of 5th and San Juan Avenues, about a block southwest of the initially reported vandalism, heard the crashing of glass and saw an individual throw a large rock through the window of a black Audi and then throw another rock at another car, both parked on 5th Avenue. The individual then ran east on Westminster Avenue. Barton called 911 at 10:50 a.m. to report that a black male in a black hat and white shirt was throwing rocks at cars at Fifth Avenue and Westminster. Barton then followed in the same direction and saw the individual already in custody.

Appellant was detained on Westminster Avenue while Officer Fletes was talking to the Kolvets about the damage to their cars.[1] The officer described appellant as a large black male wearing a white t-shirt and blue shorts and walking eastbound at the time of the arrest. Appellant got agitated during his arrest and yelled out racial slurs. After he was seated in a patrol car, appellant yelled out to Kolvet, "Stop snitching, cracker." Two off-white rocks were found in appellant's pocket.

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[1] Appellant was reported to police by a Department of Transportation worker, but the court sustained the defense's objection as to the substance of her report. The defense had made a motion in limine to exclude the worker's identification of appellant as based on a hearsay report by an unidentified witness that someone matching appellant's appearance had been smashing car windows along nearby Electric Avenue.

Barton was able to identify appellant in a field showup because he was wearing the same clothes and had the same body type, size, and hair as the individual Barton had just seen throwing rocks. Barton described the suspect as a six-foot-tall black male, fairly young, with longer hair sticking out of a cap. Barton did not recall seeing facial hair. He did not identify appellant in court, claiming lack of recall.

Howell had a harder time identifying appellant at the field showup since his clothes and hair looked different; it seemed that his hair had been combed back with gel. But his height and weight were the same, and Howell thought appellant had "an unmistakable gait about him," and a "unique" way of moving. According to the attending officer, Howell positively identified appellant at the field showup. According to Howell, he could not make a positive identification because of the distance at which he viewed appellant. Nevertheless, Howell thought appellant looked "awfully close" to the individual he had seen earlier that morning. At trial, Howell was "100 percent" certain of his identification of appellant.[2]

Officer Mora investigated the damaged cars on 5th Avenue. An Audi station wagon and orange Ford Mustang had broken windows. Amy Holt, the person to whom the officer spoke about the Audi, did not testify at trial. The Mustang was an Avis rental car, and repairing its damage cost $596.92. A gray Ford Mustang, another rental car belonging to Avis, had a swastika scratched into the hood and a scratch along the driver's side, which cost $671.70 to fix.

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[2] The police report incorrectly stated that another witness had identified appellant at a field showup.

Appellant was charged with vandalism (Pen. Code, § 594, subd. (a)) in 14 counts. Counts 1 and 2 (Furey's BMW and Mercedes-Benz), count 4 (Munoz's Lexus), count 8 (Kannett's Audi), count 9 (Saxon's Scion), count 10 (Gutierrez's Audi), and count 12 (Holt's Audi) were charged as misdemeanors. Count 3 (Cifuentes's BMW), counts 5, 13, 14 (Avis's Ford Fusion and two Ford Mustangs), counts 6 and 7 (the Kolvets' Infinity and Lexus), and count 11 (Acklen's Jeep Cherokee) were charged as felonies for damage over $400. (*Id*., § 594, subd. (b).)

Appellant's counsel moved for judgment of acquittal on all counts based on the discrepancies in appellant's identification, and specifically challenged counts 1, 2, 8, and 12, for which there was no victim testimony at trial. The motion was denied. The court noted that there was eyewitness testimony as to the vandalism in counts 1, 2, and 12. The court did not believe direct testimony of ownership was necessary, so long as the evidence circumstantially showed the cars did not belong to appellant, were in proximity to each other, and suffered similar damage.

The jury convicted appellant as charged. At sentencing, both the prosecutor and the trial court highlighted the fact that appellant had committed the vandalism counts in this case within hours of his release on probation in a similar multi-count vandalism case. Probation in that case was terminated. On the felony vandalism counts in this case, the court sentenced appellant to a total of seven years in county jail under the Realignment Act of 2011 (Pen. Code, § 1170, subd. (h)),[3]

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[3]"The Realignment Act significantly changes felony punishment by '[r]ealigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs . . . .' (§ 17.5,

consisting of 36 months on the lead count 3 and consecutive eight-month terms on the other six counts. The court imposed concurrent 180-day sentences on the misdemeanor counts, giving appellant credit for them. Appellant received 538 days of pre-sentence credit, and was ordered to pay restitution to several of the victims, as well as fines and fees.

DISCUSSION

We have reviewed the record pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436 and *People v. Kelly* (2006) 40 Cal.4th 106. Our review disclosed an issue regarding the sufficiency of the evidence supporting appellant's conviction on count 8 (vandalism of Kannett's Audi).

Under the substantial evidence test, we must determine "'whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the

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subd. (a)(5); *People v. Lynch* (2012) 209 Cal.App.4th 353, 357.) A felon sentenced under Realignment is committed to county jail instead of state prison. . . ." (*People v. Mora* (2013) 214 Cal.App.4th 1477, 1481.) Accordingly, Penal Code section 594, subdivision (b)(1) provides that in cases of damage of $400 or more, "vandalism is punishable by imprisonment" under section 1170, subdivision (h), which was enacted as part of the Realignment Act. (See *People v. Guillen* (2013) 212 Cal.App.4th 992, 995.) Under that subdivision, where no term is specified in the underlying offense, it is punishable "by a term of imprisonment in a county jail for 16 months, or two or three years." (Pen. Code, § 1170, subd. (h)(1).)

existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]." (*People v. Perez* (2010) 50 Cal.4th 222, 229.) A crime may be proven through circumstantial evidence. (*People v. Bollaert* (2016) 248 Cal.App.4th 699, 708.) However, we also must presume that the jury followed the court's instructions to disregard evidence or to use it only for a limited purpose. (*People v. Pearson* (2013) 56 Cal.4th 393, 434–435.)

Here, the trial court excluded testimony about the reported vandalism on Electric Avenue, struck Officer Fletes's testimony regarding the location of Kannett's Audi on that street, and instructed the jury not to consider the officer's testimony regarding Kannett's vandalism report for its truth. Based on these rulings and instructions, there was no competent evidence before the jury that Kannett's car was parked in the vicinity of other vandalized cars, and no basis for inferring that it was vandalized by appellant. Appellant's conviction on count 8, therefore, must be reversed.

DISPOSITION

The judgment is affirmed except with regard to appellant's conviction on count 8, which is reversed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.